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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/529,136	03/23/2005	Federico Stroppolo	1380-004	2562
47888	7590	03/21/2006	EXAMINER	
HEDMAN & COSTIGAN P.C. 1185 AVENUE OF THE AMERICAS NEW YORK, NY 10036			POLLICOFF, STEVEN B	
			ART UNIT	PAPER NUMBER
			3728	

DATE MAILED: 03/21/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

10/529,136

Applicant(s)

STROPPOLO ET AL.

Examiner

Steven B. Pollicoff

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 23 March 2005.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-5 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-5 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 23 March 2005 is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All    b) ☐ Some \*    c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                        | 4) <input type="checkbox"/> Interview Summary (PTO-413)                     |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)               | Paper No(s)/Mail Date. _____  |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date <u>3/23/05</u>   | 6) <input type="checkbox"/> Other: _____                                    |

## **DETAILED ACTION**

### ***Priority***

1. Applicant is reminded that the "Cross Reference To Related Application" section of the specification should be updated to reflect that this application is a 371 national stage of PCT/EP03/10949 filed on 10/02/2003 which claims the benefit of US provisional application 60/416,018 filed on 10/04/2002.

### ***Specification***

2. This application does not contain an abstract of the disclosure as required by 37 CFR 1.72(b). An abstract on a separate sheet is required.

### ***Claim Rejections - 35 USC § 112***

3. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-5 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. In line 5 of claim 1 Applicant uses the phrase "portion of the upper surface of the tray not fixed to the tray," and it is unclear as to how the upper surface of the tray is not fixed to the tray. For examination purposes, the examiner will interpret the phrase to read "portion of the sheet not fixed to the upper surface of the tray..." Appropriate correction is required.

### ***Claim Rejections - 35 USC § 102***

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4. The following is a quotation of the appropriate paragraphs of 35

U.S.C. 102 that form the basis for the rejections under this section made in this

Office action:

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

Claims 1,2 and 5 are rejected under 35 U.S.C. 102(a) as being anticipated by Lohmann (DE 10102818A1).

With respect to claim 1, Lohmann discloses a packaging (Fig 1 and 2) comprising a tray having a series of spaced apart sections, each section having a recess (Fig 1 reference number 4) and an upper surface; a sheet (reference number 3) fixed in part to the upper surface of the tray having at least a portion of the sheet not fixed to the upper surface of the tray thereby creating a tab (reference number 6), the tab being graduated in width from a narrow tip to a wider base, the base being adjacent to the sealed portion of the sheet, and the tab being located in one corner of the section of the tray.

With respect to claim 2, Lohmann discloses that the recesses are between 0.5 and 50 mm in diameter (Column 3, line 59).

With respect to claim 5, Lohmann discloses that there is a seal between the tray and the sheet (Lohmann USPub 2004/0050749 A1 Specification Page 1, paragraph [0007]. Even though a product-by-process claim is limited and defined by a process, determination of patentability is based on the product itself. Accordingly, if the product in a product-by-process claim is the same or obvious from a product of the prior art, the claim is unpatentable even though the prior art

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product was made by a different process. Thorpe, 777 F.2d at 697, 227 USPQ at 966; In re Marosi, 710 F.2d 799, 218 USPQ 289 (Fed. Cir. 1983). Therefore, it is sufficient that Lohmann discloses that the tray and sheet are attached by a seal and not by means of heat sealing.

5. Claims 1,3 and 5 are rejected under 35 U.S.C. 102(b) as being anticipated by Wood (US Pat No 5,046,618).

With respect to claim 1, Wood discloses a packaging (Wood Fig 1) comprising a tray (Fig 1 reference number 12) having a series of spaced apart sections, each section having a recess (Fig 1 reference number 14) and an upper surface; a sheet (reference number 17) fixed in part to the upper surface of the tray having at least a portion of the sheet not fixed to the upper surface of the tray thereby creating a tab (reference number 26), the tab being graduated in width from a narrow tip to a wider base, the base being adjacent to the sealed portion of the sheet, and the tab being located in one corner of the section of the tray.

With respect to claim 3, Wood discloses that the sheet is aluminum laminate (column 4, lines 7-11).

With respect to claim 5, Wood discloses that there is a seal between the tray and the sheet (column 2, lines 52-57). Even though a product-by-process claim is limited and defined by a process, determination of patentability is based on the product itself. Accordingly, if the product in a product-by-process claim is the same or obvious from a product of the prior art, the claim is unpatentable even though the prior art product was made by a different process. Thorpe, 777

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F.2d at 697, 227 USPQ at 966; In re Marosi, 710 F.2d 799, 218 USPQ 289 (Fed. Cir. 1983). Therefore, it is sufficient that Wood discloses that the tray and sheet are attached by a seal and not by means of heat sealing.

6. Claims 1,3 and 5 are rejected under 35 U.S.C. 102(b) as being anticipated by Dressel et al., (US Pat No 5,785,180).

With respect to claim 1, Dressel discloses a packaging (Fig 1) comprising a tray having a series of spaced apart sections, each section having a recess (Fig 1 reference numbers 26 and 28) and an upper surface; a sheet (reference number 18 and 20) fixed in part to the upper surface of the tray having at least a portion of the sheet not fixed to the upper surface of the tray thereby creating a tab (reference number 30), the tab being graduated in width from a narrow tip to a wider base, the base being adjacent to the sealed portion of the sheet, and the tab being located in one corner of the section of the tray.

With respect to claim 3, Dressel discloses that the sheet is aluminum laminate (column 11, lines 10-14).

With respect to claim 5, Dressel discloses that there is a heat seal between the tray and the sheet (column 6, lines 20-25).

***Claim Rejections - 35 USC § 103***

7. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

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The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claim 2 is rejected under 35 U.S.C. 103(a) as being unpatentable over Dressel et al (US Pat No 5,785,180).

With respect to claim 2, it would have been an obvious matter of design choice to one of ordinary skill in the art at the time the invention was made to specify the recess diameter range of the tray, since such a modification would have involved a mere change in the size of a component. A change in size is generally recognized as being within the level of ordinary skill in the art. *In re Rose*, 105 USPQ 237 (CCPA 1955).

Claims 4 is rejected under 35 U.S.C. 103(a) as being unpatentable over Dressel et al (US Pat No 5,785,180) in view of Katzner et al., (US Pat No 6,155,423).

With respect to claim 4, Dressel does not disclose that the sheet has a range of thickness from between 15 and 60 microns. However, Katzner discloses a sheet that is an aluminum laminate with a range of thickness from between 15 and 60 microns (Katzner column 6, lines 52-61) so that the contents of the tray are maintained in a moisture impervious environment, protected from

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moisture and light (column 3, lines 54-56). Therefore, it would have been obvious to one of ordinary skill in the art at the time of invention to modify the Dressel packaging to include an aluminum laminate sheet with a thickness between 15-60 microns heat sealed to the tray, as taught by Katzner, for the purpose of protecting contents within the recesses of the tray from potentially destructive conditions such as moisture and light.

### ***Conclusion***

8. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. French et al., (US Pat No 6,830,153) discloses a tray with sections, recesses and unsealed tabs.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Steven B. Pollicoff whose telephone number is (571)272-7818. The examiner can normally be reached on M-F: 7:30A.M.-4:00P.M.

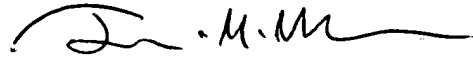
If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mickey Yu can be reached on (571)272-4562. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.



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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

SBP 3/16/06  
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**JILA M. MOHANDESI**  
**PRIMARY EXAMINER**